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No. 00-1598

In the Supreme Court of the United States

CHARLES I. COVEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government violated petitioner's rights under the Fifth Amendment by introducing at trial documents that petitioner produced in response to a grand jury subpoena.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 232 F.3d 641.

JURISDICTION

The judgment of the court of appeals was filed on November 16, 2000. A petition for rehearing was denied on January 17, 2001 (Pet. App. 19a). The petition for a writ of certiorari was filed April 17, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioner was convicted in the Western District of Missouri of conspiracy to commit

money laundering, in violation of 18 U.S.C. 1956(h); aiding and abetting money laundering, in violation of 18 U.S.C. 2, 1956(a)(1)(B)(i); and criminal forfeiture under 18 U.S.C. 982 (1994 & Supp. V 1999). Pet. App. 1a-2a; Pet. C.A. Br. Add. 1. Petitioner was sentenced to 57 months of imprisonment, to be followed by three years of supervised release, and a $19,118.44 fine. *Id.* at 2-5. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 2a, 13a.

Petitioner was an officer and shareholder of MCM Enterprises, Inc. (MCM). Pet. App. 2a. In 1993, petitioner, on behalf of MCM, loaned $50,000 to Gary and Darrell Hart to start a motorcycle business. *Ibid.* For collateral, petitioner took $70,000 in cash, which the Harts told him was drug proceeds. *Id.* at 2a-3a. When the Harts failed to make loan payments after the first seven months, petitioner deducted the remaining payments from the cash collateral. *Id.* at 3a-4a.

In 1997, a grand jury subpoenaed MCM's records of the loan and related dealings from petitioner as custodian of the corporation's records. See Subpoena to Testify Before Grand Jury 1; C.A. App. 22-23 (7/28/97 Grand Jury Tr. 3-4). When petitioner appeared before the grand jury, the government advised him that "[y]ou need not make a statement or testify or answer any question you feel may tend to incriminate you" and that he could consult with his attorney, who was waiting outside, before answering any question. *Id.* at 21-22. Petitioner, the government, and petitioner's attorney (Bruce Simon) then met outside the presence of the grand jury, after which the government questioned petitioner:

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Q. Mr. Covey, I indicated to Mr. Simon that what you said in the Grand Jury for the United States Attorney for the Western District of Missouri would not be used against you in any subsequent prosecution; is that correct?

A. As what you said or what I said? I don't understand what you said.

Q. Did I just indicate to Mr. Simon in your presence that the Government would not use what you said against you in any subsequent prosecution; what we granted you, in effect, was use immunity?

A. Okay.

Q. Is that correct?

A. To the best of my understanding.

Q. It's my understanding from speaking with your counsel that as custodian of records you are willing to produce today those records requested in the subpoena; is that correct?

A. Yes. Sure.

Id. at 24. Petitioner then turned over the documents. Petitioner did not at any time assert any Fifth Amendment privilege before the grand jury. *Id.* at 20-25.

2. During trial, petitioner stipulated to the authenticity of the records and to their status as business records, see 8/23/99 Stipulation of Facts Regarding Custodian of Records (Exh. P38), after which the government introduced the records, but did not introduce petitioner's grand jury testimony. Trial Tr.

244-247 (Test. of Lucila Rangel). The government also introduced MCM's certificate of corporate records and annual registration reports, which established that MCM was a corporation in good standing both at the time that the documents were prepared and at the time that the documents were subpoenaed and produced. See Exh. P1; Trial Tr. 245. Petitioner did not object to the introduction of the documents. See *id.* at 244-247.[1]

3. After his conviction, petitioner, represented by new counsel, moved for a judgment of acquittal or a new trial, arguing that the introduction of the documents violated his Fifth Amendment rights. Pet. 4. After the motion was denied, petitioner raised the same Fifth Amendment argument, among others, on appeal. Pet. C.A. Br. 46-47. Petitioner relied on *United States* v. *Hubbell*, 167 F.3d 552 (D.C. Cir. 1999), aff'd, 530 U.S. 27 (2000), which was affirmed by this Court shortly after petitioner filed his opening brief. See Pet. C.A. Br. 46-47; Pet. C.A. Rep. Br. 19-20. The court of appeals, relying on *United States* v. *Doe*, 465 U.S. 605, 611-612 (1984), for the proposition that documents prepared and produced by a criminal defendant may be introduced against him, rejected petitioner's Fifth Amendment argument. Pet. App. 13a.

ARGUMENT

Petitioner argues (Pet. 6-8) that this Court should vacate the decision of the court of appeals and remand the case for further consideration in light of *United States* v. *Hubbell*, 530 U.S. 27 (2000). There is, however, no reason to remand this case in light of *Hubbell*. Petitioner's Fifth Amendment claim cannot succeed

[1] In conjunction with filing this brief, we are lodging with the Court copies of the Subpoena, the Stipulation, and Exhibit P1. We have served petitioner with a copy of the lodging.

because, as the custodian of corporate records, he had no privilege against the compelled production of those records. See *Braswell* v. *United States*, 487 U.S. 99, 117 (1988) ("a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating"). And petitioner's immunity agreement provided him no more than he was entitled to under *Braswell*—that the government would make no evidentiary use of his "individual act" of production against him. *Id.* at 118. Petitioner, who did not object to the admission of the documents at trial, cannot show error, much less plain error. The Court should therefore deny the petition for a writ of certiorari.

1. The court of appeals rejected petitioner's Fifth Amendment claim on the ground that "it is generally not unconstitutional to use the contents of documents prepared and produced by a criminal defendant." Pet. App. 13a (citing *United States* v. *Doe*, 465 U.S. 605, 611-612 (1984)). To the extent that the court relied on *Doe* for the proposition that the Fifth Amendment does not prohibit the use of personal documents the production of which has been compelled, that proposition is not consistent with this Court's decision in *Hubbell*. See 530 U.S. at 40-43.

In *Hubbell*, the defendant invoked his Fifth Amendment privilege before a grand jury and refused to produce personal documents that the government had subpoenaed. See 530 U.S. at 31. In response, the government obtained, pursuant to 18 U.S.C. 6002-6003, an order that compelled the production of the documents and granted him immunity "to the extent allowed by" those provisions. See 530 U.S. at 31 (citation omitted). This Court held that the act of producing the personal documents could be compelled only if the

defendant was granted immunity pursuant to 18 U.S.C. 6002-6003. See 530 U.S. at 38, 45. The Court also held that those statutory provisions provide immunity coextensive with the Fifth Amendment privilege against self-incrimination, *id.* at 45, and therefore prohibit not only the "use" of the act of production but also the "derivative use of the produced documents." See *id.* at 38, 43.

Although *Hubbell* establishes that the government cannot use the contents of documents produced under compulsion and a statutory grant of immunity, the judgment of the court of appeals rejecting petitioner's Fifth Amendment claim is correct, because petitioner neither had nor asserted before the grand jury any Fifth Amendment right to resist production of the documents at issue here. Those documents are corporate documents of MCM. See 8/23/99 Stipulation of Facts Regarding Custodian of Records 2; Trial Tr. 246. As the government established at trial, MCM was a corporation organized under the laws of Missouri and in good standing both at the time that the documents were created and at the time that they were subpoenaed and produced. See Exh. P1; Trial Tr. 245. The documents were subpoenaed from petitioner in his capacity as custodian of corporate records. See Subpoena to Testify Before Grand Jury 1; C.A. App. 23, 24. Petitioner, as custodian of the records of a collective entity, therefore lacked any Fifth Amendment privilege to resist production of those documents. See *Braswell*, 487 U.S. at 117, 119.

Although, under *Braswell*, the government could not have introduced into evidence that the subpoena was served on petitioner as custodian of records and that he produced the documents, 487 U.S. at 118, the government did not do so. Instead, petitioner stipulated to the

authenticity of the records and to their status as business records, see 8/23/99 Stipulation of Facts Regarding Custodian of Records, after which the government introduced the records, but did not introduce petitioner's grand jury testimony. Trial Tr. 244-247. The introduction of the documents therefore did not violate petitioner's rights under *Braswell*.

2. Nor did the introduction of the documents violate the government's promise to petitioner of "use immunity"—that "what [petitioner] said in the Grand Jury * * * would not be used against [him] in any subsequent prosecution." C.A. App. 24. Because petitioner, unlike Hubbell, did not have and did not assert a Fifth Amendment right to refuse to produce the documents at issue, petitioner, unlike Hubbell, was not granted immunity pursuant to 18 U.S.C. 6002-6003. Unlike the grant of statutory immunity in *Hubbell*, 530 U.S. at 45, the non-statutory immunity that the government promised petitioner in this case was not co-extensive with the Fifth Amendment privilege that petitioner would have possessed in his individual capacity, and it did not encompass protection against derivative use. Rather, the government promised petitioner only the protection to which he was entitled under *Braswell*—that the government would not introduce into evidence that the subpoena was served on him as custodian of records and that he produced the documents, see 487 U.S. at 118; or, as the prosecutor phrased it, that the government would not use "what [petitioner] said in the Grand Jury" against him. C.A. App. 24. See *id.* at 21, 23, 24-25 (petitioner's grand jury testimony that he was present pursuant to a subpoena that was served upon him in his capacity of custodian of

records of MCM and that he produced the documents in response to that subpoena).[2]

3. Finally, because petitioner did not object to the introduction of the corporate documents at trial, his claim may be reviewed only for plain error. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 465-466 (1997); Pet. C.A. Br. 46 (acknowledging that the plain error standard applies). The plain error standard requires obvious error that affects substantial rights; even then, a court should not exercise its discretion to reverse unless necessary to protect the fairness, integrity, and public reputation of judicial proceedings. *Johnson*, 520 U.S. at 467. The introduction of the documents in this case could not have violated the Fifth Amendment under *Braswell*, and petitioner cites no authority indicating that admission of the documents was "obvious" error; indeed, for the reasons discussed above, it was not error at all. Under those circumstances, petitioner cannot meet his burden to show plain error.

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[2] Although some courts of appeals have construed a non-statutory government promise of "use immunity" to include a promise of derivative use immunity, see *United States* v. *Kilroy*, 27 F.3d 679, 685 (D.C. Cir. 1994); *United States* v. *Plummer*, 941 F.2d 799, 804-805 (9th Cir. 1991), they have done so in cases in which the witness possessed a valid Fifth Amendment privilege. Those cases, unlike this one, did not involve a promise of "use immunity" to a custodian of corporate records, who is entitled only to the limited evidentiary protection available under *Braswell*. Whether or not a non-statutory promise of "use immunity" should be interpreted to encompass the full scope of protection provided by the Fifth Amendment when a witness is entitled to that protection, the phrase should not be construed in that manner when, as in this case, the witness is not entitled to that protection.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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